



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

La Crosse County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206514

Pursuant to a petition filed October 7, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the La Crosse County Department of Human Services (“the agency”) to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Wednesday, November 30, 2022 at 10:00 AM by teleconference initiated from Madison, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601
By: Bob Uebele

Respondent:

██████████
██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of La Crosse County who has received FS benefits in La Crosse County since 2015 with occasional gaps in benefits.

2. On April 8, 2016, Respondent filed an application which included a FoodShare Penalty Warning. The warning stated, in relevant part, that use of another person's FS benefits was a violation of rules that could result in disqualification from the FS program. Respondent signed that application thereby certifying that he understood the penalties for giving false information or breaking program rules
3. Respondent was incarcerated from September 14, 2022 through at least November 30, 2022.
4. Respondent gave his FS EBT card and PIN to the mother of his daughter so that she could use it while he was incarcerated. She used his card to make five transactions between September 14, 2022 and October 4, 2022 and spent a total of \$382.51 of his benefits.
5. The mother of Respondent's child was not included in Respondent's FS household and she did not make the purchases referenced in Finding of Fact No. 4 for the benefit of Respondent.
6. On October 7, 2022, Fraud Investigator Uebele interviewed Respondent regarding the ongoing use of his EBT card while he was incarcerated and Respondent admitted that he had given the mother of his child his FS card to use while he was in jail. During that interview, Fraud Investigator Uebele explained the FS intentional program violation process and penalty and Respondent stated that he may lie to the judge and say he did not know who had his card.
7. On October 4, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent allowed others to use his FoodShare EBT card while he was in jail from September 14, 2022 through October 4, 2022.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that Respondent committed an intentional program violation by allowing a third party to use his FS EBT card after he was incarcerated. Pursuant to federal regulation, eligible food program benefits may be used only by a FS household or by an individual the FS household selects to purchase eligible food *for the household*. 7 C.F.R. §274.7(a). Similarly, under Wisconsin Statutes, it is a FS offense for an eligible person to knowingly transfer FS benefits except to purchase food from a supplier. Wis. Stat. §49.795(4). A FS recipient who allows his or her benefits to be used for the benefit of someone outside of his or her household is therefore violating FS program rules.

Respondent acknowledged that he gave his EBT card to the mother of his child for her use when he was incarcerated. It is therefore plain that he violated FS program rules. The question before me is whether he knew his action constituted a rule violation.

The agency presented evidence that in April 2016, when Respondent filed an application for FS benefits, he was given a written description of the penalties for breaking FS program rules and advised that it was against the rules

to use other people's FS benefits. At hearing, Respondent's testimony as to his understanding of the relevant program rule was equivocating. At one point, he testified, "Yes, I did allow mother of my kids to use my card. I didn't realize I was breaking any rules at the time. I thought that since she was eight months pregnant with my kid that it would be okay to let her use my FS . . . because she's pregnant with my daughter to try to help her because she's struggling and homeless." Shortly thereafter, he testified that he was asking for leniency because he "didn't totally realize what I was doing was wrong." I also note that Fraud Investigator Uebele testified (and offered contemporaneous case notes) that Respondent stated to him that he might lie to the judge about knowing who had used his EBT card. Although Respondent apparently thought better of that plan and admitted at hearing that he had given his card to the mother of his child, his comment to Mr. Uebele tarnished Respondent's general credibility.

While Respondent gave his FS card to the mother of his child out of a desire to help her, that does not obviate the possibility that he also knew that he was breaking a FS program rule by doing so. For the reasons set forth above and based on the clear and convincing evidence contained in the record, I find that Respondent understood both that the benefits issued to him were for his benefit and that FS recipients are not permitted to give away their benefits to others (or to use other's benefits). I am therefore sustaining the agency's determination that Respondent committed a first intentional program violation.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that FS benefits must be used only by or on behalf of the FS household to which they are issued and may not be transferred for any purpose other than purchasing food from a supplier. See 7 C.F.R. §274.7(a) and Wis. Stat. §49.795(4).
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

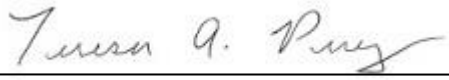
In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

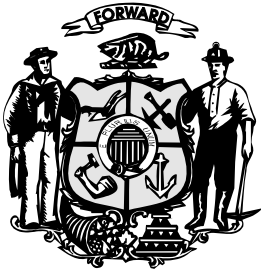
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 9th day of January, 2023



\sTeresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals

- c: Western Region For Economic Assistance - email
- Public Assistance Collection Section - email
- Division of Medicaid Services - email
- Bob Uebele - email



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The preceding decision was sent to the following parties on January 9, 2023.

La Crosse County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]